

January 29, 2004

By Electronic Filing

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte, WC Docket Nos. 02-361, 03-211, 03-45, 03-266

Dear Chairman Powell:

With more than \$1.5 billion in deployed fiber, switching and other network assets, KMC Telecom is the largest privately held nationwide telecommunications company in the U.S. KMC has invested heavily in Tier 3 and Tier 4 markets to provide the sophisticated, next-generation services usually available only in the largest cities. KMC has, in particular, devoted substantial resources to develop a full range of Voice over Internet Protocol ("VOIP") capabilities in underserved markets, where KMC provides wholesale VOIP transport and termination services to small and large companies that offer the gamut of VOIP services described in the VOIP-related petitions currently pending before the Commission.

KMC's investments¹ and the innovative new services they enable were triggered, and made possible, by this Commission's leadership and foresight in refusing to burden developing VOIP services with costly and unnecessary legacy access charge regulation. Realizing the full potential of VOIP will, of course, require substantial additional investment and innovation by both KMC and its VOIP customers. We are confident that the record in the Commission's forthcoming VOIP rulemaking proceeding will demonstrate that the public interest will be best served by continuing to exempt all VOIP services from access charge regulation, and we applaud recent statements by you and other Commissioners that proponents of increased regulation of VOIP services will bear a heavy burden in justifying that regulation.

For years, as KMC and others have invested in VOIP technologies and infrastructures, the incumbent local exchange carriers ("ILECs") have acquiesced in the Commission's pro-competitive determination that VOIP services should be exempt from access charges. *See, e.g.,*

¹ In reliance upon the Commission's pro-competitive decision not to tax VOIP services with access charge (or other inappropriate legacy regulation), KMC has already invested over more than \$10 Million (and plans to invest tens of millions of dollars more) to deploy and upgrade IP based switching, signaling, transport, and other facilities to enable KMC to offer voice-quality backbone network services to other carriers.

Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, *Intercarrier Compensation NPRM*, 16 FCC Rcd. 9610 ¶ 133 (2001) (“Internet Protocol (IP) telephony . . . is exempt from the access charges that traditional long-distance carriers must pay”). But now, just as the promise of VOIP services is beginning to be realized, several ILECs urge an unprecedented ruling that would chill future VOIP investment and innovation and that could only be viewed as a decision by the Commission to abandon its efforts to spur the evolution to a 21st century communications infrastructure. These ILECs, led by SBC, are pressing the Commission to rule not only that all VOIP services must now pay access charges, but that access charges should apply *retroactively* to at least some VOIP services. And even in advance of a Commission ruling on those arguments, these ILECs are already sending carriers demand letters for the payment of past period access charges.

It should be unthinkable for the Commission to take seriously these ILEC pleas for retroactive windfalls over and above the fully compensatory PRI and reciprocal compensation payments they have already received for delivering VOIP traffic. Other carriers have explained why SBC is wrong in arguing that the Commission is legally compelled to allow ILECs retroactively to collect access charges on VOIP services.² My purpose in writing to you is to stress the practical consequences – and severe irreparable harm – that would necessarily accompany any retroactive application of access charges.

An about face now would place KMC and other facilities-based carriers in an impossible position. First, an intermediary carrier such as KMC faces enormous difficulties distinguishing among the different types of VOIP traffic that is handed off to it: some of that traffic may involve only a backbone protocol conversion, but it may instead – or in addition – be comprised of Vonage-type IP application traffic. Retroactivity would guarantee years of disputes between ILECs and innocent carriers such as KMC over the nature of the traffic that was transported months or years ago, and the technological and record-keeping barriers to efficient resolution of such disputes should not be underestimated.

Second, the risks associated with retroactive imposition of above-cost charges are not ones that an intermediary such as KMC can, or could be expected to, manage effectively. Indemnities and other contractual provisions are often only as good as the credit of the customer handing off VOIP traffic to the intermediary, and the *Report to Congress* hardly provided the basis for carriers to shape their behavior by distinguishing carefully among different types of VOIP traffic for purposes of selecting their customers.

Third, retroactive imposition of liability would make it impossible for a facilities-based carrier such as KMC to plan its future investment, or to justify to its investors why it is undertaking that investment. Like the rest of the industry, we had understood the *Report to Congress* to establish a zone free from traditional access regulation, at least on an interim basis.

² See, e.g., November 25, 2003 *ex parte* Letter from Thomas Jones (on behalf of Time Warner Telecom) to Marlene H. Dortch (CC Docket No. 02-361); December 22, 2003 *ex parte* Letter from David L. Lawson (on behalf of AT&T Corp.) to Marlene H. Dortch (CC Docket No. 02-361); January 7, 2004 *ex parte* Letter from Norina Moy (on behalf of Sprint) to Marlene H. Dortch (CC Docket NO. 02-361).

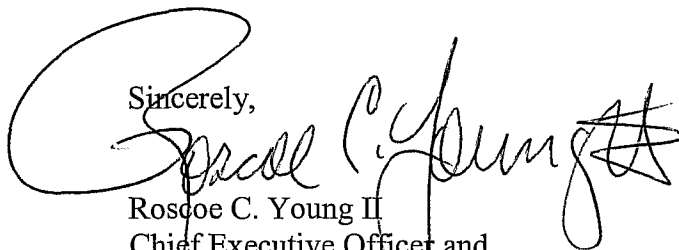
If, now, that turns out not to be the case, to the substantial detriment of our investors, they (and we) would understandably be skeptical of the prospect of relying upon other Commission policies designed to foster new technologies and services as we plan our service and network rollouts. Well might they say: fool me twice, shame on me.

Fourth, as you have adverted to, companies developing IP-based services provide special opportunities for many citizens, including members of minority groups, who seek the rewards of participating in this dynamic sector. To impose a significant setback on the development of the sector, and to provide a windfall instead to the largest and most established carriers, hardly fosters that laudable vision.

Finally, KMC stresses that any decision the Commission reaches regarding VOIP should not be made in a vacuum. Specifically, the Commission should focus its efforts towards resolving the long-standing inequities and inconsistencies associated with the archaic interstate and intrastate access charge systems. KMC urges the Commission to forbear from imposing any access charges on VOIP traffic until long overdue action has been taken to develop a rational and unified intercarrier compensation regime.

~~KMC looks forward to participating in the forthcoming rulemaking proceeding. But the~~ Commission must put an end to the investment-chilling uncertainty caused by ILEC demands for payments for past periods. The Commission should state unequivocally in the Public Notice that initiates the VOIP rulemaking proceeding that: (i) all VOIP services are currently exempt from access charges, and (ii) any future determination by the Commission that any VOIP service will be subject to access charges will apply only prospectively from the date of that future Commission decision.

Sincerely,



Roscoe C. Young II
Chief Executive Officer and
Chief Operating Officer
KMC Telecom Holdings, Inc.

cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Matthew Brill
Jessica Rosenworcel
Dan Gonzalez
Lisa Zaina
Marlene H. Dortch